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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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September 11, 1979

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	4
Statement of the Case	5
A. Control of Overflows is Mandated by Congress; Elimination of Overflows was Ordered by the Courts Below	8
B. Procedural History	9
C. Description of the Metropolitan Milwaukee Sewerage System	11
D. Decision of the District Court and the Court of Appeals	15
Reasons for Granting the Writ	17
I. The Decisions Below Elevate Federal Common Law Above Federal Statutory Law Controlling Interstate Waste Water Discharges; They Will Impose Cost Increases Over the Amounts Required by Congress of Hundreds of Millions of Dollars on the Defendants and Many Billions of Dollars on the Nation at Large for Eliminating Combined Sewer Overflows; and the Decisions Specified	

Accelerated Timetables Having Different Fiscal Impacts on Local Governments Than the Political Allocations by Congress 17

II. The Decisions Below Ignored Previous Decisions of This Court Which Are Controlling Precedent and Which Establish That in the Absence of Demonstrative or Empirical Evidence of Any Nuisance, the Conflicting Testimony of Expert Witnesses Is Not Sufficient to Accord Relief in an Action Alleging an Interstate Nuisance 31

A. The Record is Devoid of Any Demonstrative or Empirical Evidence of Nuisance in Illinois or Michigan Waters. The Courts Below Could Rely Only on the Speculations of Experts Which Were Contradicted by Historical Fact 31

B. Neither Illinois Nor Michigan Require the Level of Control of Overflows Ordered by the Courts Below 41

III. This Action Should Have Been Dismissed on the Ground: (1) That the Court Had No Jurisdiction Over the Person of the Defendants, or (2) That the Venue in the Action Was Improperly Laid in the District Court for the Northern District of Illinois, or Upon Both Such Grounds 43

Conclusion 46

CITATIONS

Cases

	Page
Arizona v. California, 373 U.S. 546 (1963)	25,26
Cole v. Trustees of Columbia University, 300 F. Supp. 1026 (S.D.N.Y. 1969)	45
Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976)	30,31
E. I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	26
Hanson v. Denckla, 357 U.S. 235 (1958)	44
Illinois v. Milwaukee, 406 U.S. 91 (1972)	1,5,6, 9,24, 25,28, 31,33
Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979)	*passim*
Illinois v. Milwaukee, N.D. Ill. No. 72-C-1253 ("Findings of Fact and Conclusions of Law," July 29, 1977) rev'd in part and aff'd in part 599 F.2d 151 (7th Cir. 1979)	*passim*
Illinois v. Milwaukee, 366 F.Supp. 298 (N.D. Ill. 1973)	2,10
Illinois v. Milwaukee, 4 E.R.C. 1849 (N.D. Ill. 1972)	2,9,44
International Shoe v. Washington, 326 U.S. 310 (1945)	44

Ladew v. Tennessee Copper Co., 218 U.S. 357 (1910) 45

Leroy v. Great Western United Corp., ____ U.S. ____, 47 U.S.L.W. 4844 (June 26, 1979) 46

Markham v. City of Newport News, Va., 184 F.Supp 659 (E.D. Va. 1960) 45

Mississippi and M.R. Co. v. Ward, 2 Black. 485 (1863) 45

Missouri v. Illinois, 200 U.S. 496 (1906) 33,34, 35,36, 37,42

Missouri v. Illinois, 180 U.S. 208 (1901) 33

New York v. New Jersey, 256 U.S. 296 (1921) 33,37, 38

North Dakota v. Minnesota, 263 U.S. 365 (1923) ... 33,40, 41

Parks Co. v. City of Decatur, Ill., 138 F. 550 (6th Cir. 1905) 45

The Sewerage Commission of the City of Milwaukee et al. v. State of Wisconsin Department of Natural Resources (Dane Cty. Cir. Ct. of Wis. No. 152-1342, May 25, 1977) 13

United States v. State of Michigan et al., E.D. Mich. No. 77-1100 (Sept. 9, 1977) 43

STATUTES:

Federal Water Pollution Control Act, as amended
- Section 217, 33 U.S.C. §1297 7,25
- Section 301, 33 U.S.C. §1311 23,27
- Section 302, 33 U.S.C. §1312 27,39
- Section 306, 33 U.S.C. §1316 27
- Section 307, 33 U.S.C. §1317 27
- Section 402, 33 U.S.C. §1342 ..... 13,26,27, 28,39
- Section 403, 33 U.S.C. §1343 27
- Section 505, 33 U.S.C. §1365 27,45
- Section 509, 33 U.S.C. §1369 39

Judicial Code, as amended
- 28 U.S.C. 1254(1) 1
- 28 U.S.C. 1391(b) 5,44,45

Wisconsin Statutes (1977)
- Section 59.96 11
- Sections 62.60 — .67 11
- Section 147.20 39

Illinois Revised Statutes (1971)
- Chapter 110, §17 4,9,44

MISCELLANEOUS:

F. R. Civ. P. 12(b) 1,10

S. Ct. R. 22(3) 1

Annot., 93 A.L.R. 500 (1934) 45

Ill. Pollution Control Bd. R. and Regs. ch. 3, §602 (1976) 42

Grad, *Treatise on Environmental Law* (Matthew Bender 1977) 30

Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196 (1977) 28

Zener, *The Federal Law of Water Pollution Control,* in *Federal Environmental Law* (E. Dolgin and T. Guilbert, ed. 1974) 29
EPA, *1978 Needs Survey: Cost Methodology for Control of Combined Sewer Overflows and Stormwater Discharge,* EPA Rpt. No. 43019-79-003 (Feb. 10, 1979) 19
EPA, *Report to Congress on Control of Combined Sewer Overflow in the United States,* MCD Rpt. No. 50 (Oct. 1, 1978)..... 18
EPA, *Nationwide Evaluation of Combined Sewer Overflows and Urban Storm Water Discharges,* EPA-600/2-77-064a (Sept., 1977) 19
GAO, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution — A National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979) 19,20,42

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Petitioners,

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PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

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The petitioners are the City of Milwaukee, The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee. They pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 26, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals dated April 26, 1979 is reported at 599 F.2d 151, and is reproduced in the Appendix to this petition, *infra* (bound separately), at A-1 *et seq.* The opinion of the Court of Appeals was accompanied by an unpublished order dated April 26, 1979 which was not officially reported, but is unofficially reported at 13 E.R.C. 1069 and reproduced in the Appendix to this petition, *infra,* at B-1 *et seq.* An order denying a petition by the State of Illinois for a rehearing was entered by the Court of Appeals on June 14, 1979 and is

reproduced in the Appendix to this petition, *infra,* at C-1 *et seq.* The judgment order entered by the United States District Court for the Northern District of Illinois on November 15, 1977 is reproduced in the Appendix to this petition, *infra,* at D-1 *et seq.* A stipulation between the parties dated November 14, 1977 concerning the District Court's November 15, 1977 judgment order is reproduced in the Appendix to this petition, *infra,* at E-1 *et seq.* The opinion of the District Court at the conclusion of the trial on July 29, 1977 was not reported and is reproduced in the Appendix to this petition, *infra,* at F-1 *et seq.* The opinion of the District Court dated November 1, 1973 denying petitioners' motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is reported at 366 F.Supp. 298 and is reproduced in the Appendix to this petition, *infra,* at G-1 *et seq.* The opinion of the District Court dated November 16, 1972 denying petitioners' motion to dismiss for lack of personal jurisdiction and improper venue was not officially reported but is unofficially reported at 4 E.R.C. 1849, and is reproduced in the Appendix to this petition, *infra,* at H-1.

This proceeding has its genesis in this Court's decision in *Illinois v. Milwaukee,* 406 U.S. 91 (1972), reproduced in the Appendix to this petition, *infra,* at I-1 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. This petition for certiorari has been filed within 90 days of the date of that denial. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 22(3) of the Supreme Court Rules.

QUESTIONS PRESENTED

I. Where Congress has now adopted the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, acts intended to provide uniformity, finality and an effective remedy to all persons including states in the field of abatement of water pollu-

tion and to assure that similar point sources with similar characteristics will meet similar effluent limitations by providing for establishment of regulations to set effluent control limitations or standards by an agency that is best equipped for the purpose by reason of specialization, experience and expertise, has the time come when these new federal laws and new federal regulations adopted thereunder, control the federal common law?

II. Where the trial court found that: (1) fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from defendants; (2) there is no evidence of any outbreak of water-related diseases in Illinois; (3) there is no evidence that any specific algal taste or odor problem is attributable to defendants; and (4) it is impossible to measure accurately any effect on the lake caused by defendants' discharges or to measure accurately the diminution in the amount of nutrients in the lake if they were altogether discontinued, and where plaintiffs failed to perform studies which they could and should have performed to determine whether pathogens and pollutants in defendants' sewage effluents actually reached plaintiffs' waters, may the courts conclude that a federal common law nuisance has been established?

III. Where the theoretical possibility of exposure to enteroviral diseases, which have short incubation periods, has existed for many decades, but the trial court expressly found that there is no evidence of the outbreak of any enteroviral disease, may the courts hold that a federal common law nuisance has been established based solely upon the theoretical possibility?

IV. May the courts hold that defendants are creating a federal common law nuisance on the basis of express findings by the trial court that: (1) defendants' nutrient discharges to the lake cannot be isolated out, either legally or factually; (2) balancing the equities is really difficult to apply because each dollar of expenditure for better sewage

treatment cannot be shown to result in a specific amount of benefit to the lake; (3) there is no evidence of defendants having a present effect on fish life; (4) there is no evidence of any specific algal taste or odor problem attributable to defendants; and (5) nutrients from many sources, only some of which nutrients emanate from defendants, are causing accelerated eutrophication of the lake?

V. Where federal statutory and administrative provisions establish a federal policy to require a cost-effective approach to pollution control, may the trial court expressly refuse to consider costs and cost-effective considerations, and instead fashion a remedy without any regard whatsoever to such matters?

VI. Where the defendants did nothing in the forum state and did nothing to avail themselves of the law of or the privilege of conducting activities within that state, did the court of the forum state have personal jurisdiction over the defendants and did venue in the action properly lie in the Northern District of Illinois?

STATUTORY PROVISIONS INVOLVED

1. Section 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, §17 (1971), provided in pertinent part as follows at the date the instant action was commenced (it has not been amended in any pertinent respect since then):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
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> * * *

(b) The commission of a tortious act within this State."

2. 28 U.S.C. 1391(b) states:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

3. Also involved in this proceeding is the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251-1376. The Act is lengthy and, therefore, its pertinent provisions are set forth in the Appendix to this petition, *infra,* at J-1 *et seq.*

STATEMENT OF THE CASE

This case has its origin in the Supreme Court's decision in *Illinois v. Milwaukee,* 406 U.S. 91 (1972). This petition presents for decision unsettled legal issues of paramount significance to every municipal corporation, every state, and the nation at large. It presents the first opportunity for this Court to define the scope of its decision in *Illinois v. Milwaukee* in light of the subsequent enactment of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, and implementation of the nationwide regulatory and funding program created by Congress in that legislation. The result in this case will determine the timing of and the expenditure of literally hundreds of millions of dollars by your petitioners and will affect the expenditure of tens of billions of dollars in the nation.

In *Illinois v. Milwaukee, supra,* the State of Illinois filed a motion for leave to file a complaint under the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin, alleging that the defendants were polluting Lake Michigan, an interstate body of water, and seeking the abatement of the alleged public nuisance. The Court denied the motion for leave to file under the Court's

original jurisdiction, without prejudice to the right of the State of Illinois to file an action in an appropriate United States District Court. The Court noted that the basis of such an action would be "federal common law" (406 U.S. at 102, App. I-11); that, as of the time of the decision, the federal statutes and regulations provided only for "long-drawn-out" abatement procedures which were not inconsistent with the application of a federal common law to abate a public nuisance in interstate or navigable waters (406 U.S. at 103, App. I-12); *but* that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." (406 U.S. at 107, App. I-16).

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois.

Five months later, on October 18, 1972, Congress enacted PL 92-500, the Federal Water Pollution Control Act Amendments of 1972 (the "1972 Act").[1] That enactment substantially replaced the previous language of the Federal Water Pollution Control Act referred to in the Supreme Court's decision, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which had been amendments to the Federal Water Pollution Control Act first passed in 1948.

On December 27, 1977, shortly after the entry of the judgment in this action, Congress enacted and the President signed the Clean Water Act of 1977 (the "1977 Act"), PL 95-217, which amended the FWPCA in certain important respects.

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[1] The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. §§1251-1376. For ease of cross-reference, the U.S.C. § numbers will be set out in parentheses after the Act's section numbers; viz.: Sec. 301 (§1311). The Federal Water Pollution Control Act, as amended, is referred to herein as either "the Act" or "FWPCA".

Among many other changes, Section 41 of the 1977 Act added new Sec. 217 (§1297):

> "Any guidelines for cost-effectiveness analysis published by the Administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201(b), 201(d), 201(g)(2)(A), and 301(b)(2)(B) [§§1281(b), 1281(d), 1281(g)(2)(A), and 1311(b)(2)(B)] of this Act."

Thus, Congress had dealt with the precise subject matter of this action *before* judgment was entered below and refined the Congressional mandate *after* judgment was entered.

The District Court entered judgment in favor of the plaintiffs which ordered essentially two basic remedies (App. D-1 *et seq.*). The first required your petitioners to treat all sewage at all times in compliance with effluent limitations many times more stringent than those imposed pursuant to the FWPCA and requiring an additional treatment process known as "advanced wastewater treatment" to be constructed and operated over and above the statutorily mandated "secondary treatment".[2] The second basic remedy required your petitioners to construct a sewage conveyance, storage and treatment facility which would have the capacity to "eliminate" all overflows of raw sewage from combined sanitary and storm sewers during periods of wet weather. The system was to be large enough to permit advanced waste treatment of water from any storm up to the size of the largest storm in Milwaukee's historical record and to permit the treatment of any overflows which may conceivably occur from a storm larger than the largest storm in that history with "bar screens, followed by drum screens, followed by chlorination prior to discharge." The Court of Appeals dealt with the two basic parts of the District Court Judgment separately. It re-

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[2] See App. A-40 for a description of "secondary treatment." Generally, "advanced wastewater treatment" refers to tertiary treatment processes requiring additional capital facilities.

versed the District Court's order insofar as it imposed effluent limitations more stringent than those required by FWPCA, which reversal eliminated the need to construct advanced waste treatment facilities required to meet the reversed effluent limitations. However, the Court of Appeals affirmed the District Court's order to the extent that the order required the "elimination" of all sewage overflows during wet weather periods, thereby leaving intact the need to undertake a massive construction program to build additional sewage collection, transport and treatment facilities.

A. *Control* of Overflows is Mandated by Congress; *Elimination* of Overflows was Ordered by the Courts Below.

The concept of "control" of overflows as mandated by Congress versus the concept of "elimination" of sewer overflows reflects and describes the basic and fundamental difference between the cost effective solution to sewer overflows enacted by Congress and the remedy ordered by the courts below. Any sewer system including its treatment plants has inherent storage capacity. When that capacity is exceeded, it overflows. But, the process is not that simple. Sewer systems may be "separate" systems in which only sanitary sewage is collected and treated or "combined" systems which gather both sanitary sewage and storm water runoff for treatment. Because any sewer system has the ability to contain and process a substantial volume in the pipes, conduits, tunnels and plants which constitute the system, invariably a capacity greater than the dry weather flow to the system, it follows that such overflows from a system as may occur, usually in its combined sewer areas, happen when the system is affected by a storm event. Overflows for that reason are caused by storm water quantities that enter the system over and above the normal dry weather flows. This in turn means that when an overflow occurs in a "controlled" system, it occurs primarily after the system and its stored pollutants have been or are in the course of being flushed to and treated in the treatment plants of the system; the overflowing liquids from a "controlled" system are therefore in large part storm water runoff. Congress and the administrative

agency created by federal statute recognize this factor in providing for "control" of combined sewer overflows on a cost-effective basis. In essence, the permits granted under FWPCA establish a level of protection of the nation's waters by mandating sufficient volume capacity in a "controlled" combined sewer system to prevent overflows until a particular magnitude of storm event occurs, usually the "six month" or "two year" storm depending on the specifics of the system and the waters into which the discharge will be made. The amount of control imposed, i.e. the storm event planned for, is related to the costs of the degree of control required to meet the water quality requirements of the receiving waters and the other particular circumstances of the system being controlled. In contrast to the legislative "control" approach, the approach of the courts below was to *eliminate* combined sewer overflows by ordering mammoth storage capacity with attendant pumping and other facilities regardless of cost and regardless of the fact that the last vestiges of overflows eliminated are only prevented at enormous cost.

Essentially, Congress and the regulatory permit system have recognized the law of diminishing returns and provide for control of overflows from combined sewer systems so as to prevent the discharge of the vast majority of pollutants to the nation's waters while keeping costs in perspective. The courts below, however, have ignored that concept in favor of total elimination without regard to costs or benefits secured.

B. Procedural History

As stated previously, this case was commenced on May 19, 1972, shortly after this Court's decision in *Illinois v. Milwaukee, supra.* The complaint was served upon the defendants pursuant to the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, §17 (1971). Subsequent to service of the complaint the defendants moved to dismiss the action on the ground that the trial court lacked jurisdiction over the person of the defendants and that venue of the action did not properly lie in the Northern District of Illinois. The District Court denied these motions. *Illinois v. Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (App. H-1

et seq.). The defendants then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois v. Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973) (App. G-1 *et seq.*).

Trial to the court commenced on January 11, 1977. It spanned six months, produced over 14,000 pages of transcript, hundreds of exhibits, and focused upon highly technical subject matter requiring extensive use of expert testimony to explain and interpret complex scientific issues (the plaintiff's experts being limited to theories and the defendant's witnesses reviewing actual tests performed by them as well as the applicable scientific theories). It was in this setting that at the conclusion of the case the trial court, while permitting oral argument, rejected briefs and dictated a decision from the bench. In the trial court's words:

> "Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (App. F-3 and 4)

Significantly, the trial court did not as a "remedy for the problem" defer to the expertise of the administrative body set up by Congress to deal with the subject.

In subsequent hearings before the District Court held on September 9, 1977 and November 14, 1977, where the time within which to complete the ordered remedy was under consideration, the District Court clearly indicated that the two previously imposed requirements of the court, i.e. (1) to completely "eliminate" all overflows; and (2) to meet the effluent limitations specified by the court, were both to be applicable without respect to their costs, without benefit of any cost-effective analysis and without regard to the availability of federal funding under FWPCA, which funding is limited to cost-effective solutions to pollution control (Transcript of September 9, 1977 hearing before the District Court, pp. 107-111; Transcript of November 14, 1977 hearing before the District Court, pp. 38 and 56).

C. Description of the Metropolitan Milwaukee Sewerage System

The defendant Commissions[3] and the City of Milwaukee are each municipal bodies corporate organized and existing under the laws of the State of Wisconsin.

Although each has separate functions, taken together the defendant Commissions and the City of Milwaukee construct, operate and maintain sewer facilities which serve the County of Milwaukee, Wisconsin (except for the City of South Milwaukee). The area served ("Metropolitan Milwaukee Area") is approximately 420 square miles and has a population in excess of 1 million persons (Trial Transcript pp. 9262-9267).

The facilities operated by the defendants to serve the Metropolitan Milwaukee Area include a series of sewer systems

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3 Wis. Stat. §§59.96(5)(a) and 62.60-.67 (1977).

and two sewage treatment plants. The Metropolitan Sewerage Commission of the County of Milwaukee ("Metropolitan Commission") constructs sewers in the Metropolitan Milwaukee Area outside of the City of Milwaukee. Upon completion, sewers constructed by the Metropolitan Commission are transferred to the Sewerage Commission of the City of Milwaukee ("City Commission") which thereafter operates and maintains them along with sewers which it has constructed in the City of Milwaukee. The City Commission also operates and maintains the two sewage treatment plants. The City of Milwaukee operates and maintains some sewers in the City of Milwaukee.

The two sewage treatment plants, which are respectively 25 and 39 miles from the Illinois border, are designed to provide "secondary" treatment for sewage effluent discharges (e.g., D.Ex. 84; P.Ex. 89-90). The effluent discharge from the main sewage treatment plant is made to Lake Michigan inside of a man-made breakwater three miles from the nearest Milwaukee drinking water intake (D.Ex. 504). Other sewage effluent discharges are made from the other plant directly into the lake approximately eight miles from the nearest Milwaukee drinking water intake and from time to time directly into tributary streams of Lake Michigan from designated "over-flow" points in the sewage collection system. *(Id.).*[4] Even with this close juxtaposition of drinking water intakes and effluent discharge points, there is no record showing that Milwaukee has experienced enteroviral or bacterial epidemics.

In 1974 the defendant City Commission and the City of Milwaukee applied to the State of Wisconsin Department of Natural Resources ("DNR") for permits to discharge the

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[4] "Overflow" is defined in the Judgment Order from which this appeal arises as "a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment" according to specified standards (App. D-2).

described sewage effluent into Lake Michigan and certain tributary streams in Milwaukee County. Such applications were made pursuant to FWPCA, and procedures adopted thereunder.

Prior to receiving such permit applications, DNR qualified under Sec. 402 (§1342) of FWPCA as a discharge permit-granting agency under the superintending jurisdiction of the United States Environmental Protection Agency ("EPA"). Each and every action of DNR in the premises was in accordance with the requirements of FWPCA and was tacitly or actively approved by EPA (Trial Transcript p. 9323).

Following public notice (including, among other things, notice to each of the plaintiffs pursuant to Sec. 402(b)(3) (§1342(B)(3)) of FWPCA and hearing (none of the plaintiffs chose to participate therein), in late 1974 DNR issued discharge permits to the City Commission and the City of Milwaukee under which they have operated, are operating, and at all times material herein, were operating the sewer system and treatment plants serving the Metropolitan Milwaukee Area. (P.Ex. 62-63; D.Ex. 1110).

The permits issued by DNR established specific requirements and parameters for the sewage effluent discharges of the defendant City Commission and the City of Milwaukee. The permits also established timetables for the attainment of such requirements and parameters, provided for monitoring for compliance, and contemplated enforcement of their terms (*Id.*).

The defendant City Commission failed in some respects to fully comply with its permit requirements. Pursuant to the permit enforcement authority specified by Sec. 402(b) (§1342(b)) of FWPCA, the DNR effectuated enforcement proceedings in Dane County Circuit Court, Dane County, Wisconsin, in an action entitled *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources* (Case No. 152-1342). The permit enforcement action resulted in the entry on May 25, 1977 of a judgment

enforcing the City Commission's discharge permit requirements and providing comprehensive timetables for making the necessary improvements including the correction of wet weather overflows from the combined sewer area (D.Ex. 1311).

Insofar as material here, the discharge permit requirements imposed on petitioners, as implemented by the Dane County Circuit court order, include the following:

1. Secondary treatment of effluents processed in sewage treatment plants operated by the defendants shall be provided.

2. The secondary treatment provided shall cause the effluent discharges from the treatment plants to contain: no more than 30 parts per million (30 PPM) suspended solids (SS) based on a 30 day average, no more than 30 PPM of carbonaceous 5 day biochemical oxygen demand (BOD_5) based on a 30 day average, no more than 1 PPM phosphorus (P) based on a 30 day average, and no more than 200 fecal coliform per 100 milliliters based on a 30 day average.

3. Chlorination at certain times, but no provision as to chlorine residuals.

4. Requirements for elimination of dry weather overflows throughout the system and control of storm induced Combined Sewer Overflows ("CSO") in the combined sewer area. Specific relief provisions related to the availability and provision of state and federal funding are included for these and other permit requirements, with provision for certain deadline extensions so long as $13 million per year for the combined sewer overflow abatement program and $15 million per year for other mandated captial improvements measured in 1976 dollars of local funds are being expended. (P.Ex. 62-63; D.Ex. 1110 and 1311)

The cost-effective character of the "control" required in the permits and the dependancy upon the availability of federal funds reflect the mandate of the federal statute and are absent in the decisions below.

It must be emphasized that the Dane County order calls for control of combined sewer overflows. Since total elimination of combined sewer overflows is technically impossible, *i.e.*, a more severe storm than the level of protection engineered into the system can always occur, the determination of the level of protection is a matter of engineering judgment. The Dane County order will be enforced to guarantee virtual elimination of combined sewer overflows. It is likely that the order can be satisfied by a system designed to prevent overflows at a level of something less than the one-hundred year storm or storm of record. The Dane County order is also "cost sensitive" in that combined sewer overflows were recognized by the parties to be only a portion of the problem faced by Milwaukee and that combined sewer overflows, once several major overflow points were eliminated, would have a lesser priority than other remedial work being undertaken by petitioners. For that reason, the Dane County order was drafted to require continuous progress toward control of combined sewer overflows on a schedule which reflected the fact that federal funds might not be available in certain years in the quantity necessary for optimum progress.

D. Decision of the District Court and the Court of Appeals

During the trial, the State of Illinois failed to call a single witness who had any direct responsibility for public health in that state. The witnesses presented by Illinois had no specific experience with public health in the State of Illinois, the City of Milwaukee or Lake Michigan. They were witnesses who were qualified as "experts," who testified with respect to general scientific principles, and who reached conclusions therefrom with respect to Illinois, Milwaukee and Lake Michigan. While the District Court favorably commented upon the credentials of all of the expert witnesses who testified at the trial, the court

also noted that all of the witnesses were interested in the outcome of the case and none of them were neutral as between the parties or as to the outcome of the case (App. F-4). The determination of liability and remedy imposed upon your petitioners was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted in and by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so and in so electing chose to produce less evidence than it should have (App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (App. F-18).

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the

amount of nutrients in the lake if Milwaukee discharges were altogether discontinued (App. F-19).

Based on the record, including the above findings, the Court of Appeals properly reversed the District Court insofar as it imposed an effluent limitation remedy more stringent than required by FWPCA. Inexplicably, the Court of Appeals affirmed the District Court's order to the extent that it required the "elimination" of all sewage overflows.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Elevate Federal Common Law Above Federal Statutory Law Controlling Interstate Waste Water Discharges; They Will Impose Cost Increases Over The Amounts Required By Congress of Hundreds of Millions of Dollars On The Defendants And Many Billions Of Dollars On The Nation At Large For Eliminating Combined Sewer Overflows; And The Decisions Specified Accelerated Timetables Having Different Fiscal Impacts On Local Governments Than The Political Allocations By Congress.

The decisions below are a judicial foray into the polictical field of resource allocation in environmental management of the nation's interstate water resources requiring expenditures of municipal, state and federal funds of staggering magnitude.

Congress, in order to supplant initial ineffective legislation, and after many hearings and extensive debate, has in the 1972 Act and 1977 Act enacted comprehensive federal statutes establishing an administrative body of federal experts acting by and through qualified state expert administrators to regulate, in cost-effective terms, *all* point source discharges to the nation's waters under an ongoing permit system.

One of the basic characteristics of the Congressional mandate in that legislation is that costs and the availability of federal

funds to localities and states providing interstate water protection are important to pollution control determinations. Nevertheless, costs and the availability of federal funds were not only ignored below, they were expressly declared by the District Court to be of no interest to the decisional rationale.

The decisions below considered federal legislation as a parallel course for protecting the nation's water resources which was of passing, but not controlling, interest to the totally independent approach by the courts under the federal common law, thus failing to accord any weight to the Congressional provision for participation of affected municipalities and states in an expert administrative forum; this while expressing the trier of fact's own lack of expertise in the area. In that setting both the District Court and the Court of Appeals held the "federal common law" to be wholly distinct from, and independent of, the federal statutory scheme for controlling the identical subject matter, namely point source discharges to the nation's waters.

The courts in doing so failed to recognize and deal with the pervasive character of the problem. The issues involved in this case are not merely directed to the resolution of an isolated situation in Milwaukee. They present a problem to this nation as a whole. There are approximately 1,300 communities in the United States, including most of the major cities, which have a total combined sewer area of 2-1/4 million acres, and serve a total of 38 million persons. In fact, 58 major cities such as Chicago, Detroit, New York, Cleveland, Pittsburgh, Philadelphia, San Francisco and Washington, D.C., located in 24 states, have eighty-three percent of the combined sewer area and eighty-one percent of that resident population. EPA, *Report to Congress on Control of Combined Sewer Overflow in the United States,* MCD Rpt. No. 50 (EPA's report pursuant to Sec. 516(c) of FWPCA, Oct. 1, 1978).

With respect to funding combined sewer overflow (CSO) abatement projects, after estimating national costs at $21.16 billion (1978 dollars) for *controlling* combined sewer overflows so as to permit two untreated overflow events per year rather

than totally eliminating them[5], the EPA's October 1, 1978 report to Congress states:

> "It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs . . . These trade offs must be weighed carefully for any given municipality." (pp. ES-9-10)

Illustrative of the technical considerations and their impact on costs to the public is a passage from EPA, *Nationwide Evaluation of Combined Sewer Overflows and Urban Storm Water Discharges,* EPA-600/2-77-064a (Sept., 1977):

> "Analysis indicated that control of [overflows from combined sewer at the level of] the one hour, one month storm would permit capture of 90 percent of the precipitation volume. Sizing for the two year, one hour storm yields relatively little incremental control and requires a much higher [cost and] control volume." (p. 3)

A more specific example of the fiscal impact of dealing with combined sewer overflows and one which has direct application to this litigation is provided by a very recent GAO report, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution — a National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979). The report considered whether a Tunnel and Reservoir Plan ("TARP") is a cost-effective solution to Chicago's combined sewer overflows. The TARP plan is similar to the "convey, store and treat" solution ordered by the court below to solve the combined sewer overflow problems in the Milwaukee area except, as noted in the report, TARP is not

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[5] *See EPA, 1978 Needs Survey: Cost Methodology for Control of Combined Sewer Overflows and Stormwater Discharge,* EPA Rpt. No. 43019-79-003 (EPA's report to Congress pursuant to Sec. 516(b) of FWPCA, Feb. 10, 1979).

intended to *eliminate* overflows; it is merely meant to *control* them.

According to the GAO, TARP is "one of the largest" public works projects in the nation.

> "[I]ts projected costs will probably exceed the $9.2 billion expended for the Alaskan pipeline." (Vol. 1, p. 1)

* * *

> "Determining the precise cost for TARP and the associated projects is difficult. However, it will be expensive — $4 billion to $8 billion (December 1977 estimates) depending on what estimates are used and which associated projects are included in the total. If history is any indication, costs will continue to escalate and could exceed $11 billion by 1983." (Vol. 1, p.4)

In summary, the GAO report says that when TARP is judged by what it will cost, the taxpayers "must stop and think."

> "In February 1979, EPA estimated that it would take more than $25 billion just to solve the pollution problems of combined sewer communities. If the cost of solving flooding problems associated with combined sewers is included, it could ultimately run more than $100 billion. Thus, the time may have come to reexamine the project." (Vol. 1, pp. 34-37)

It is in this setting, where the technical problems are only beginning to be known, where means to control the problem have monumental fiscal implications, and where major segments of the country and vast numbers of its population are affected, that the courts below have acted. With respect to the evidence relating to Milwaukee's plans to control combined sewer overflow on cost-effective bases consistent with federal

statutory and administrative regulations (P.Ex. 23-30), the District Court said:

> "I read much of the material in the Combined Sewer Overflow study and I find in it no express commitment to the elimination of the overflows. What I find is reference to 'control' of the overflows and 'reduction' of overflows. It is not altogether clear to me that the Combined Sewer study starts with the propostion that the overflows must be eliminated.
>
> I can save a lot of time, and I am going to save a lot of time in the event any further study of that issue is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated." (App. F-25)

With respect to costs, the District Court blandly stated:

> "This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, because it is easy to get carried away by the huge numbers that have been bruted about. In my view, the cost of eliminating the overflows, is not really a factor here." (App. F-28)

Thus, the District Court ordered the total elimination of overflows, ordered that the cost of accomplishing this objective was not a factor, and ordered the parties to submit timetables to carry out the remedy so imposed on the defendants. The Court of Appeals affirmed, but with the comment that:

> "[T]he defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants." (App. A-39)

The defendants here are faced with compliance with a costly judgment of the District Court which had determined costs were not a factor; a judgment affirmed by a Court of Appeals on the basis of defendant's failure to provide it with the very same evidence which the District Court gave defendants no opportunity to present! That evidence has now been refined, and shows increased costs of approximately 60% or $300,000,000 in addition to amounts required under the congressional permit system for CSO control.[6]

When one considers that the numbers involved in this case amount to literally hundreds of millions of dollars for these defendants alone and to tens of billions of dollars for the nation as a whole, the conduct of the trial court denying the relevancy of costs which prevented full proof thereof, followed by an appellate decision predicated on a lack of evidence of costs, cannot be permitted to stand as a monumental precedent to the irrelevancy of cost.

The *ad hoc* approach of the courts below will, unless reversed, establish a precedent creating untold harm to the uniform, fiscally responsible approach adopted by Congress in FWPCA and administered by the EPA. In mandating the total elimination of all overflows without respect to cost or the availability of federal funds, the rights of indiviual citizens, municipalities and states throughout the United States are subjected to a precedent having impact upon the entire nation's water resources and having fiscal impacts reaching magnitudes important even to the total federal budget, let alone the budgets of affected municipalities and states.

In enacting FWPCA, Congress recognized that while substantial local and state funds would be required to alleviate

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[6] In accordance with paragraph 8 of the District Court's Judgment Order, Defendants have made extensive engineering studies (including Pilot Plant operations) which have refined these costs (App. D-8). The studies have all been monitored by Illinois engineers at defendants' cost in accordance with paragraph 4 of the Judgment Order (App. D-6).

detrimental discharges to the nation's waters, the potential disastrous fiscal impact on particular municipalities to secure advantages to the nation's waters which would be encountered if the entire cost impact were imposed on local or state governments had to be avoided. Thus, the Congressional enactments clearly contemplate federal funding to municipalities to a very substantial percentage of cost, usually 75%, and further provide for delays in capital expenditures in the event federal funds are not available. In fact, Congress specifically amended FWPCA in 1977 to provide for extensions of time where municipalities' failures to provide the mandated controls were caused by the unavailability of federal funds (Sec. 301(i) (§1311(i) of FWPCA).

It needs no lengthy analysis to demonstrate that with the huge numbers involved in the costs of wastewater treatment, if the requirements imposed on particular municipalities in respect of wastewater treatment are not weighed on fiscal scales which consider local and state financial resources including the availability of federal funds, local fiscal disasters are not only possible but inevitable. Congress clearly recognized this basic consideration.

In contrast, the District Court said:

> "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available but if it is not, the program decreed by this order must proceed nonetheless." (App. F-28)
>
> * * *
>
> "But I want to disabuse you right now, Mr. Moerke, and thereby save you some time — that is why I am saying it now. There is no point in your preparing a lot of testimony on alternate theories — if you don't get Federal money, it is going to take you this much longer, and preparing experts to say how much longer — because as I said earlier, on the 29th of July, this

> order will not be contingent upon your getting Federal funding. Milwaukee sewage is not a federal problem." (Transcript of September 9, 1977 hearing before the District Court at p. 42)

Congress has balanced political considerations in providing that federal funding is a significant factor to the timing and implementation of wastewater treatment programs, recognizing that political and fiscal realities are necessarily encountered in dealing with problems connected with the nation's waters. The courts below, on the other hand, explicitly refused to even consider fiscal impacts. After stating its conclusion that cost and the availability of federal funds are irrelevant, the District Court required that the "program decreed by this order must proceed nonetheless....Milwaukee sewage is not a federal problem" (*Id.*) The courts and Congress could not be further apart.

Thus, the decisions below present an important question of federal law which has not been, but should be, settled by this court. Particularly is this true when, in addition to the fiscal and political balances being struck by the federal statutory law, one takes into account the chronology of this Court's early decision giving rise to this case, the decisions below and the sequence of Congressional enactments.

In *Illinois v. Milwaukee, supra,* decided in 1972, this Court said:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."

At the time of that decision, federal legislation attempted to deal with the subject matter of water resources by specifying water quality criteria for the receiving water. The water quality criteria approach was a total failure from the standpoint of administration and results. However, five months after the complaint was filed herein, Congress acted to preserve the nation's water resources by totally revamping the pertinent federal statutory framework so as to control the discharge of

wastewater. Thus, Congress required each and *every* "point source" of wastewater discharge to be the subject of a permit issued by experts after public hearings with all affected parties — including neighboring states — having the right to be heard and to be protected.

It is equally significant that within two months after the trial court decision, Congress refined its 1972 legislation making explicit statutory pronouncements on the importance of fiscal considerations; requiring *cost-effective* solutions to the determination of water resource protection, and clarifying national goals in the light of those determinations and the existence of federal funding (Sec. 217 (§1297) of FWPCA).

The Supreme Court has recognized that federal legislation on the subject of interstate waters establishes the federal law in place of previously applicable federal common law principles. *Arizona v. California,* 373 U.S. 546 (1963), cited in *Illinois v. Milwaukee, supra* at 106 (App. I-15). The *Arizona* case dealt with the allocation of water in the Colorado River between the various states that border on that river. Congress had passed a statute which provided for a method and formula for allocation of those waters. The State of California argued that the apportionment of the water in the Colorado River should be controlled by the common law doctrine of equitable apportionment which the Supreme Court had applied in earlier cases between various States of the Union. The Supreme Court rejected the State of California's argument, noted that a federal statute was involved, and said:

> "It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between states. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the lower Basin states the mainstream water to which they are entitled under the Compact. *Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable*

> *apportionment' for the apportionment chosen by Congress."* (373 U.S. at 565, emphasis added)

It is time for this court to settle the important questions of federal law impacting upon major interstate waters, involving millions of citizens and requiring billions of dollars of local, state and federal funds. To cause the expeditious and efficient expenditure of the billions of federal, state, local and private dollars required to abate water pollution, dischargers must be assured as to what the applicable standards are. Practical and economic reality dictates that dischargers required to expend huge sums of public funds know that the applicable standards are fixed and final. Under the federal statutory scheme, this concern is embodied in Sec. 402(k) (§1342(k)) which establishes that compliance with a permit shall be deemed compliance with the Act. Section 402 (k) (§1342(k)) provides:

> "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 309 and 505 [§§1319, 1365], with sections 301, 302, 306, 307, and 403 [§§1311, 1312, 1316 and 1343], except any standard imposed under section 307 for a toxic pollutant to human health. . . ."

In *E. I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 138 n.28 (1977), this Court said:

> "The purpose of [Sec.] 402(k) [§1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [Sec.] 402(k) serves the purpose of giving permits finality."

If a discharger remains subject to suit under the "federal common law" as applied by the courts below, and subject to an *ad hoc* determination by the court, without respect to the standards under the federal statutory law, it would ill behoove any municipality or other governmental agency to move forward in an

expenditious manner but would rather place a premium on delay to permit all forums having possible jurisdiction to speak so as to prevent false starts in these monumentally expensive public projects with attendant waste of public funds.

Section 505 (§1365) is the provision of the Act providing for citizen suits. Subsection (e) thereof states:

> "(e) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief against the Administrator or a State agency)."

Since compliance with a permit is specifically defined by Sec. 402(k) (§1342(k)) as compliance with Sec. 505 (§1365), and since common law actions are provided for in Sec. 505, it follows that the standards and limitations under Secs. 301, 302, 306, 307, and 403 (§§1311, 1312, 1316, 1317 and 1343) are the maximum discharge limitations to which a discharger may be held under common law or the federal statutory scheme.[7] Thus, the language of the 1972 amendments to the Federal Water Pollution Control Act require the conclusion that the federal common law of interstate water pollution is governed by permit

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[7] Section 301 (§1311) sets forth effluent limitations and/or the authority for the Administrator of the Environmental Protection Agency to define effluent limitations.

Section 302 (§1312) authorizes the Administrator to establish stricter limitations than are found in Sec. 301.

Section 306 (§1316) contains the authorization for the Administrator to set national standards of performance.

Section 307 (§1317) authorizes the Administrator to establish toxic and pretreatment effluent standards.

Section 403 (§1343) concerns ocean discharge criteria.

limitations in those instances in which the harm complained of is the subject of a permit issued pursuant to the Act.

The decision of the Seventh Circuit Court below is directly contrary to the Federal Statute on the matter.

The impact of Sec. 402 (§1342) was brought to the attention of the Seventh Circuit below and extensively briefed by the defendant Commissions and City of Milwaukee. The court below summarily rejected the statutory governance of federal common law without discussion of the issue in its decision.

Once Congress acted to provide the uniform rules and meaningful remedies, the manner in which the basic interests of the nation would be attained were set out and defined. The federal common law, to the extent it continued in the area, should be limited to carrying out the Congressional mandate. With the definitive legislative action of Congress, the sole branch of government in which all states are represented, the federal common law does not remain subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois v. Milwaukee, supra* at 107-108 (App. I-16 and 17); "catch as catch can" rules as might be established in case-by-case judicial determinations made by federal district, appellate and supreme court judges are no longer in vogue. The basic interests of federalism demand that independent judicial aproaches to a "federal common law" must give way. The rationale for this conclusion is aptly stated in Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1228-1230 (1977) as follows:

> "Congressional control of interstate spillovers is supported by a final consideration: the inherent power of Congress to take measures reasonably necessary for preserving the system of union. Spillovers have and will continue to create tensions among the states. As economic development proceeds and populations grow, interstate pollution will increase, and with it the potential for retaliatory tactics and litigation.

Congressional power to mitigate these tensions through preventive legislation is implicit in the very decision to replace a loose confederation hamstrung by interstate friction with a strong national government.

* * *

Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute."

In Zener, *The Federal Law of Water Pollution Control,* in *Federal Environmental Law* (E. Dolgin and T. Guilbert, ed. 1974) at 790 the former General Counsel of the Environmental Protection Agency says the following:

"Finally, whatever limited importance the federal common law might have as a tool for the regulation of water pollution will tend to recede as the FWPCA Amendments of 1972 are implemented and detailed, numerical standards are established for the major categories of waste dischargers. In *Illinois v. Milwaukee,* the Court stated that '[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.' This formulation was obviously intended to give the Court some leeway in deciding whether to follow the rules contained in the FWPCA. However, since the decision, the 1972 Amendments have established a much more comprehensive regulatory scheme than had previously existed. If, under that scheme a discharger is governed by an administratively established effluent limitation embodied in a federal permit, it seems doubtful that a

> federal court would intervene under the auspices of federal common law to impose a different standard on the discharger."

Similarly, Professor Grad in *Treatise on Environmental Law* (Matthew Bender, 1977), which followed the passage of the 1972 amendments to the FWPCA, says the following regarding federal common law in light of that statute:

> "The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a Federal common law of nuisance seems both unnecessary and unwarranted in the light of recent Federal standards and Federal enforcement sanctions provided under appropriate legislation."

This same rationale was expressed by the Court of Appeals for the Fourth Circuit in *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F.2d 1006 (4th Cir. 1976). That court said:

> "To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon the statute.
>
> *Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.* The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application

> of more restrictive standards. While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides." (539 F.2d at 1009, emphasis added)

It is in this light — the acknowledged enactment of comprehensive legislation in the field — that this court must decide the issue left for subsequent resolution in its 1972 *Illinois v. Milwaukee* decision. This Court and this Court alone is in position to bring national order out of the seeds of chaos sown by the decisions below.

II. The Decisions Below Ignored Previous Decisions Of This Court Which Are Controlling Precedent And Which Establish That In The Absence Of Demonstrative Or Empirical Evidence Of Any Nuisance, The Conflicting Testimony Of Expert Witnesses Is Not Sufficient To Accord Relief In An Action Alleging An Interstate Nuisance.

A. The Record Is Devoid Of Any Demonstrative Or Empirical Evidence Of Nuisance In Illinois Or Michigan Waters. The Courts Below Could Rely Only On the Speculations Of Experts Which Were Contradicted By Historical Fact.

A fundamental, basic and controlling fact of this case is that no witness and no exhibit in the entire record found any virus, or other pathogen from any source in any Illinois or Michigan waters. Instead, the evidence presented by the plaintiffs consists of some fecal coliform counts and the conclusions and opinions of experts all of whom, as the District Court noted, were interested in the outcome of the case and none of whom were neutral as between the parties or as to the outcome of the case (App. F-4). Specifically, the District Court made the following findings *after first acknowledging* that the expert testimony was sometimes over the head of the court, that the court's grasp of some of the testimony was less complete than

the court would have liked it to be, and that it would have taken the enrollment of the court in a university course directed at a reorientation of its entire education to remedy this deficiency (App. F-3 and 4):

1. If the position of the State of Illinois is correct, a properly conducted study should have resulted in some circumstantial evidence that would tend to confirm Illinois' theory. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are not sufficiently diluted in and by Lake Michigan so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so because it was afraid of a negative result and in so electing chose to produce less evidence than it should have. (App. F-10)

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee. (App. F-11)

3. There is no evidence of any outbreak of water-related diseases in Illinois. (App. F-12)

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake. (App. F-18)

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure

> accurately the diminution in the amount of nutrients in the lake if Milwaukee discharges were altogether discontinued. (App. F-19)

Thus, the undisputed fact is that over the many years spanning the more than a century that Milwaukee has been in existence, there has been no showing of any disease or any other adverse affect resulting in Illinois or Michigan waters from sewage discharges in Wisconsin, indeed, no outbreak of disease has been shown to have occurred in Milwaukee itself though the drinking water intakes of Milwaukee are close to the points of discharge while those of Illinois and Michigan are, to say the least, remote. Note that the concern expressed by the courts below related to enteroviral diseases; diseases which manifest themselves in a matter of weeks after exposure (Trial Transcript pp. 2139, 2198). Certainly if there were any merit to the speculated hazard, there would be *some* evidence of its existence, some evidence that it actually caused *something* in the lengthy span of time during which the supposed hazard existed. There is nothing!

This Court's 1972 decision in *Illinois v. Milwaukee* relied upon previous decisions of this Court as having established a "federal common law" relating to interstate nuisance controversies. These cases are *Missouri v. Illinois,* 180 U.S. 208, 200 U.S. 496 (1901, 1906), *New York v. New Jersey,* 256 U.S. 296 (1921) and *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

The status of the evidence in this case as summarized in the findings of the District Court set out above is strikingly similar to the evidence before this Court in *Missouri v. Illinois, supra.* This Court rendered two decisions in the *Missouri v. Illinois* case. The first decision, reported at 180 U.S. 208, dealt with procedural matters at the demurrer stage of the proceedings.

When the *Missouri* case came before the Supreme Court on the merits, Justice Holmes had this to say about the earlier decision (the only one cited by the District Court in this case):

"The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future, with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate.

* * *

But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence in it is to be approached." (200 U.S. at 517-518)

Justice Holmes proceeded to emphasize two major legal principles: (i) Congress has the power to enact the paramount law, and (ii) the courts should not take the place of the legislature.

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that state's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover.

> *But the fact that this court must decide does not mean, of course, that it takes the place of a legislature.* . . . If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.
>
> * * *
>
> The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new." (200 U.S. at 518-520, emphasis added)

The Supreme Court then stated that these legal principles affect the manner in which a court must view the evidence.

> "It is decided that a case as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, *but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved."* (200 U.S. at 520, emphasis added)

The Supreme Court then turned to the evidence. It is strikingly similar to — though much stronger than — the evidence before the courts below:

> *"The plaintiff's case depends upon an inference of the unseen.* It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the *Milwaukee* case now before the Court] and second, that the bacillus of typhoid can

and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. . . . we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

* * *

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected [In the *Milwaukee* case, the trial court found that plaintiff had chosen not to perform available detection studies, thus producing less evidence than it should have because fearful of the result!]. But the plaintiff relies upon proof that such bacilli are discharged into

the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *bacillus coli communis,* which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference.

* * *

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through, they would be scattered and enfeebled and would do no harm." (200 U.S. at 517-527, emphasis added)

While the evidence before the Court in *Missouri v. Illinois* was strikingly similar to and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below — the Supreme Court dismissed the case!

Similarly, the Supreme Court in *New York v. New Jersey, supra,* met the same evidentiary problem and held that in such a situation history prevails over the speculation of experts.

"[T]he evidence of the complaint is that, as early as 1906, the water adjacent to New York City . . . was much polluted by sewage, but that the water in other parts of the bay, especially near Robbins reef light, was somewhat, but not greatly, contaminated. . . . And the evidence taken under the order of the court

in 1919 shows an irreconcilable conflict in the testimony as to the then condition of the water, especially near Robbins reef light. [I]t is undisputed that . . . New York sewage, untreated, was discharged from over 450 sewers directly into the adjacent waters . . . .

* * *

It would seem, therefore, that if the anticipations of the experts for the complainants, as to the results likely to be produced by the effluent from the sewer of defendants, were well founded, by the year 1919 [in the case of Milwaukee, 1972] conditions in the harbor should have become so pronounced and plain [in the case of Milwaukee the epidemics of enteroviral disease would have been so rampant] that there could not have been such conflict as the record shows in the testimony of trustworthy and competent scientists as to its then existing condition.

* * *

[W]e must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intend to discharge into Upper New York Bay . . . would so corrupt the water of the Bay as to create a public nuisance . . . ." (256 U.S. at 311-314)

Contrary to the action of the courts here which found liability and imposed severe and costly remedies on the defendants, the Supreme Court there, in extremely similar fact circumstances, dismissed the action. That same result is compelled here where there is *no* demonstrative evidence of *any* effect from more than a hundred years of Milwaukee's discharges to Lake Michigan.

This is particularly true in light of the fact that Milwaukee's discharges to Lake Michigan have been and continue to be the subject of a statutory scheme administered by an independent federal agency interested only in the public health and public navigable waters, and which agency is unbiased as between contesting parties.

Of more than passing interest is the fact that Illinois and Michigan chose not to participate in the administrative proceedings relating to Milwaukee's permits although under the federal statute they had notice and a full opportunity to do so. FWPCA §302(a) (§1312); §509(b) (§1369); §402(b)(5), (§1342(b)(5)); Wis. Stat. §147.20 (1977). Those states and states relying on this case for precedent should not be permitted to take weak cases to non-expert federal court forums for a trial on expert opinion to avoid the application of independent, neutral expertise under the congressionally enacted permit system.

An analysis of the proceedings below that involves no record dispute leads to reversal. The analysis starts with the legal truism that in order for plaintiffs to prevail they must have introduced some evidence with respect to the actual state of Lake Michigan water within the jurisdiction of each of the plaintiffs. Lake Michigan is out there; its waters are available for scientific analysis. Testing procedures to prove the existence of the dangers speculated upon by the witnesses are known and available. Yet plaintiffs chose to do no such testing — a choice which the District Court characterized as having been made out of fear over the results (App. F-10). Are there viruses in Illinois' waters? Are there pathogenic bacteria in Illinois' waters? The best that can be said for the record before this Court is that no one really knows and that the plaintiffs did not prove what was there and did not want to find out for sure.

The plaintiffs should have been required to come forward with some empirical evidence relating to public health and actual conditions in the lake. This was the type of evidence required by the Supreme Court when it had occasion to deal with similar issues. Before a court imposes liability for untold millions of dollars of expense should it not know what the real

danger is? Should it not at least require that an attempt be made to determine the existence of these alleged dangers?

Speculations by the courts below as to remotely possible coincidental results that might be inferred from the outer reaches of some of the hypotheses of experts cannot withstand against known and observable facts before the court. Here such physical tests as were taken in Lake Michigan were taken by defendants and they negate the existence of pathogens in Illinois waters; even more importantly, the fact that there has been no outbreak of any water-borne infections or diseases in Illinois certainly negates any claim that a hazard exists or has existed in the last hundred years that Milwaukee has been discharging effluent to Lake Michigan 25 miles away from Illinois.

Where a party claims that a hazard exists requiring injunctional intervention at hundreds of millions of dollars in cost, and where that alleged hazard has existed for a hundred years, the language and logic of the Supreme Court in *North Dakota v. Minnesota, supra,* should put an end to the controversy:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities.
>
> * * *
>
> To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates and conjecture based on no accurate knowledge of the flow of the Mustinka before the

ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta zone, existence of which the greater weight of the evidence negates.

* * *

The conclusion we have come to on the main issue of fact — that Minnesota is not responsible for the floods of which complaint is made — makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin." (263 U.S. at 385-388)

While thousands of pages of transcipt and hundreds of exhibits have been adduced, a review of the record as a whole does not actually establish a right to relief such as to cause a court to reach the necessity of deciding the effect of the Federal statutes and the underlying administrative action upon the federal common law nuisance the plaintiffs' attempt to establish.

This Court has repeatedly held that speculations based on hypotheses of experts do not rise above demonstrated and demonstrable facts. Here the facts are clear. No pathogens have been shown in Illinois waters. No effects of pathogens have been shown in Illinois. No accelerated eutrophication resulting from defendants' discharges has been shown in either Illinois or Michigan territorial waters. All we have is some expert hypotheses versus other expert hypotheses followed by a never-ending and inconclusive chain of speculation.

B. Neither Illinois Nor Michigan Require The Level Of Control Of Overflows Ordered By The Courts Below.

If the hazards Illinois and Michigan allege are presented by overflows from the Milwaukee sewage system were truly a con-

cern of those plaintiffs, rather than being a strawman for this litigation, one would assume that a requirement to completely eliminate all overflows would be imposed by both Illinois and Michigan on their own municipal sewage discharges in order to protect their own citizens. In truth and in fact, neither Illinois nor Michigan require the total elimination of all overflows as ordered by the courts below.

In *Missouri v. Illinois, supra,* 200 U.S. at 522, this court stated:

> "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but as some of those discharges are [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."

Illinois does not prohibit combined sewer overflows nor require their complete elimination. Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution, §602 (1976) (P.Ex. 171). The State of Illinois, through its Environmental Protection Agency, has permitted the City of Waukegan, which is served in part by combined sewers, to build a treatment plant which will allow bypasses of sewage into Lake Michigan from what is defined as a one-year storm (Trial Transcript pp. 13444-45, 13450).

Illinois permits the City of Chicago to discharge large volumes of untreated sewage into Lake Michigan by means of reversals or backflows of the Chicago Canal System. Such backflows into Lake Michigan of hundreds of millions of gallons of polluted river water containing untreated sewage have occurred 19 times from 1959 through 1978, with 12 of those in the last 10 years (Trial Transcript pps. 4026-4034; D.Ex. 170 p. 9; GAO Report CED-79-77, supra, Vol. 1 p. 18).

In the City of Chicago, where combined sewers service one of the largest areas and population in the United States, the planned TARP project, even if finally completed at a cost estimated to be between $4 billion and $11 billion, *will not eliminate overflows.*

With respect to the State of Michigan, On September 9, 1977, that State entered into a consent judgment in Civil Action No. 77-1100, in the United States District Court for the Eastern District of Michigan, wherein the United States of America was the plaintiff and the State of Michigan and the City of Detroit were defendants. That consent judgment does not require the "elimination" of combined sewer overflows, it rather mandates a program for the attainment of "control" of overflows from the combined sewer system in a cost effective manner (*United States v. State of Michigan et al,* E.D. Mich. No. 77-1000, Sept. 9, 1977, judgment p. 29).

The difference in cost between a system which has the capacity to totally eliminate overflows as distinguished from an environmentally sound cost effective system to control overflows is hundreds of millions of dollars in Milwaukee alone. Its precedential effect on the nation would be fiscally disasterous. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own citizens cannot be justified by reliance upon federal common law.

III. This Action Should Have Been Dismissed On The Ground: (1) That The Court Had No Jurisdiction Over The Person Of The Defendants, Or (2) That The Venue In The Action Was Improperly Laid In The District Court For The Northern District Of Illinois, Or Upon Both Such Grounds.

This action was commenced in the United States District Court for the Northern District of Illinois by the filing of a complaint alleging three causes of action, the first based upon the federal common law of nuisance, and the second and third based upon state statutory and common law, the first being held

by the Court of Appeals to be controlling so as to preclude the latter two from being addressed (App. A-46 n.53). The complaint was served upon the defendants pursuant to the Illinois "long-arm" statute, Ill. Rev. Stat. ch. 110, §17 (1972) (see "Statutory Provisions Involved", *supra*).

Subsequent to the service of the complaint, the defendants moved to dismiss the action on the ground that the court lacked jurisdiction over the person of the defendants and that venue of the action did not properly lie in the Northern District of Illinois. The trial court (Judge Bauer presiding) denied these motions. *Illinois v. Milwaukee,* 4 E.R.C. 1849, 1850 (N.D. Ill. 1972) (App. H-4).

The facts in this case clearly establish that none of the defendants have acted in any way which would justify the conclusion that they had either committed "a tortious act *within*" the State of Illinois (the statutory requirement to come under the Illinois long-arm statute) or that they have the requisite "minimal contacts" with the State of Illinois that are a constitutional prerequisite to the exercise of power over them by the State of Illinois. This is not a products liability case where it is arguable that the act of a manufacturer in shipping a product into a state is that type of act by which the manufacturer purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Cf., International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *Hanson v. Denckla,* 357 U.S. 235 (1958). Here the defendants do nothing in the State of Illinois. They take no act to purposely avail themselves of the privilege of conducting activities within the State of Illinois; they invoke no benefits or protection from the laws of the State of Illinois. The courts below brushed aside the difficult statutory and constitutional issues presented by the facts of this case and defendants' motion to dismiss by summarily rejecting the motion.

The treatment of the venue issue below was equally summary. The courts relied upon 28 U.S.C. §1391(b), which states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Specifically, the courts below relied upon the words "or in which the claim arose" and opined that the claim of the State of Illinois arose in the Northern District of Illinois "where the injury was suffered." This was error. The courts below are bound by relevant federal authority. *See, Cole v. Trustees of Columbia University,* 300 F. Supp. 1026, 1029 (S.D. N.Y. 1969) and Sec. 505(c)(1) of FWPCA (§1319(c)(1)), which statute provides as follows:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."

Though the defendants pointed out that as a matter of law, the claims made against them in the complaint were inherently "local" in nature, the District Court concluded that the claims were "transitory" (App. H-3). The Court of Appeals held that this distinction was not significant (App. A-5 and 6). In reaching these conclusions the courts disregarded the decisions of this Court which held that nuisance actions are "local" (their locus is their source) and not "transitory" (their locus does not follow to any place of asserted damage). *Ladew v. Tennessee Copper Co.,* 218 U.S. 357 (1910); *Mississippi and M.R. Co. v. Ward,* 2 Black. 485 (1863), and disregarded the long established principle that actions against municipal corporations are themselves inherently local in nature, so much so that absent specific statutory provision to the contrary, they cannot be brought outside the judicial district where the municipal corporation is situated. *See,* Annot., 93 A.L.R. 500 (1934); *Parks Co. v. City of Decatur, Ill.,* 138 F. 550 (6th Cir. 1905); *Markham v. City of Newport News, Va.,* 184 F. Supp. 659 (E.D. Va. 1960).

Now this Court has clarified the meaning of §1391(b) in *Leroy v. Great Western United Corp.*, ____ U.S. ____, 47 U.S.L.W. 4844 (June 26, 1979). As clarified, venue was improperly laid in the Northern District of Illinois requiring reversal and a direction to dismiss. In this Court's language:

> "In our view, therefore, the broadest interpretation of the language of §1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility — in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff) — may be assigned as the locus of the claim." (47 U.S.L.W. at 4847, emphasis in original)

In this case *all* of the conduct complained of occurred in the defendants' district; very few of the witnesses (including plaintiffs' witnesses) resided in the district of trial; many of defendants' witnesses resided in defendants' district and *all* defendants reside in the Eastern District of Wisconsin, not in the district of trial.

In the absence of personal jurisdiction and appropriate venue, this action should be dismissed.

CONCLUSION

No more important federal question could be presented than one which includes:

1. The relationship between federal statutory law and federal common law;

2. The governance of conduct in two or more states affecting the nation's water resources;

3. Fiscal responsibility of a degree presenting possible bankruptcy to communities and funding hardships to the nation as a whole;

4. The determination of whether all of the issues must be uniformly determined for all of the nation's waters or be subject to *ad hoc*, parochial departures from even-handed approaches; and

5. The determination of the issue of *in personam* jurisdiction over, and the proper venue for actions dealing with, point source discharges by municipalities.

All are present here. Each would on its own strongly suggest the grant of the Writ sought. Together, they emphatically require it.

Respectfully submitted,

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